No. 76-820

In the Supreme Court of the United States

OCTOBER TERM, 1976

BRIGHT D. OKAGBARE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner, an alien, contends that, instead of being excluded from the United States, he should have been admitted subject to deportation proceedings.

1. In early September 1971 petitioner left the United States to return to Nigeria, his native country. He left in order to attend to damage done to his farm during the civil war there; he also sought to bring four of his children to this country. When he left the United States, petitioner had a visa authorizing him to stay in the United States as a student.

Petitioner and four of his children sought to enter the United States on September 22, 1971. They were denied entry in New York when petitioner failed to produce proper travel documents and his answers to questions

indicated that he may have engaged in employment in violation of his student visa (Pet. App. 2a-3a). They were, however, paroled into this country for the sole purpose of attending a deferred exclusion proceeding in Detroit. This hearing was held on July 6, 1972.

The hearing officer took extensive testimony from petitioner and the employment services supervisor of Chrysler Corporation. The Immigration Judge concluded from this testimony that petitioner had been a full-time employee of Chrysler for a number of years prior to his departure for Nigeria, and that petitioner intended to resume this unauthorized full-time employment immediately after reentering the United States (Pet. App. 4a-6a). Indeed, after being paroled into the United States in September 1971, petitioner again took up full-time employment with Chrysler, and he was working for that firm at the time of the exclusion hearing (*id.* at 5a). The Immigration Judge ordered petitioner excluded from the United States pursuant to 8 U.S.C. 1182(a)(20) because he had lost his student status and therefore did not have a valid entry document in his possession at the time of his attempted reentry in September 1971.

The Board of Immigration Appeals dismissed petitioner's appeal, concluding that the Immigration Judge's findings were supported by the record (Pet. App. 7a-10a).[1] Petitioner sought review in the court of appeals, which dismissed his petition for lack of jurisdiction (*id.* at 11a).

2. The dismissal was proper under 8 U.S.C. 1105a(b), which bars review by the court of appeals of orders excluding aliens from this country. This was such an

[1]The Board observed that petitioner had admitted that he took full-time work in order to support his large family, and that he had purchased a house in Detroit (Pet. App. 8a).

order. Section 1105a(b) provides that *habeas corpus* lies to challenge an order of exclusion, but petitioner did not pursue that remedy.

Petitioner seeks to avoid the effect of Section 1105a(b) by arguing that he should have been admitted to the United States and then subjected to deportation proceedings, which may be reviewed in the court of appeals. Even if this were correct, the proper forum in which to present it would have been the district court, and the proper way to raise it would have been a petition for a writ of *habeas corpus*. If the court had agreed with petitioner's arguments, it could have set aside the order of exclusion and ordered the Immigration and Naturalization Service to institute deportation proceedings.

Petitioner relies on *Maldonado-Sandoval* v. *United States Immigration and Naturalization Service*, 518 F. 2d 278 (C.A. 9), but that case offers him no support. *Maldonado-Sandoval* dealt with the procedures that should be used with respect to aliens lawfully admitted for permanent residence; it recognized that aliens such as petitioner, who were not admitted for permanent residence, lawfully could be excluded on their return to the United States after a short visit abroad (*id.* at 280).[2] Petitioner does not challenge the finding of the Immigration Judge that he did not possess the proper documents to enter the United States to take full-time employment. His exclusion therefore was proper, and the court of appeals was without jurisdiction to review it.

[2]Although petitioner was physically present in the United States at the time he was ordered to be excluded, he was present only as a parolee. He therefore properly was treated as a person seeking admission. *Leng May Ma* v. *Barber*, 357 U.S. 185. Cf. *Saxbe* v. *Bustos*, 419 U.S. 65, 68; *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

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